(17)

Office - Supreme Court, U. S.
FILED
AUG 17 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 310

JOHN LEN LACY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

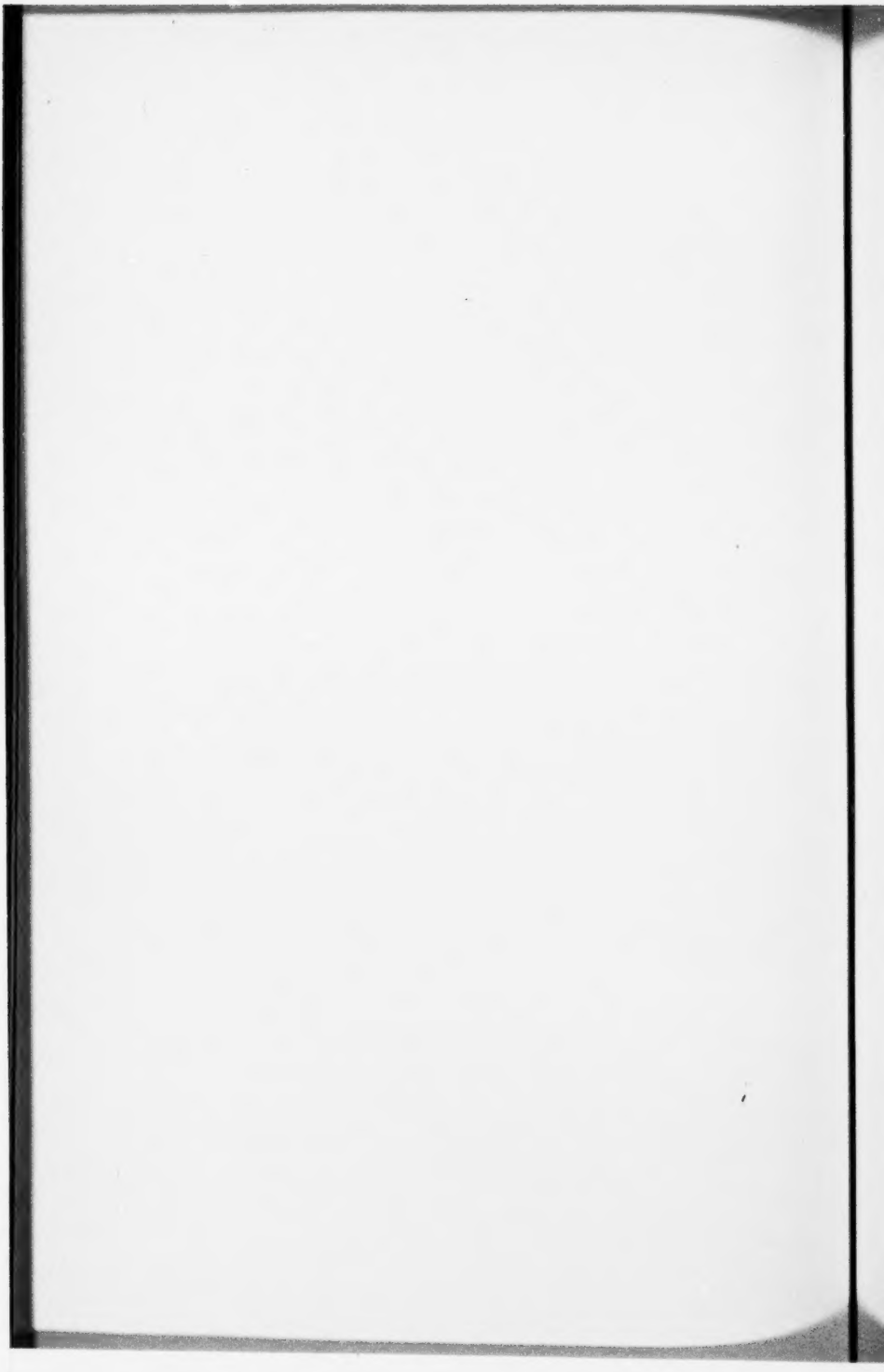
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT,

And

BRIEF IN SUPPORT THEREOF.

FRANK J. LOONEY,
Attorney for Petitioner.

Of Counsel:
BEN F. ROBERTS,
J. RALPH GOFF.



INDEX.

	Page
PETITION:	
Statement of Facts	1
Judgment	2
Statement of Matters Involved	3
Jurisdiction	6
Questions Presented	6
Reasons Relied On	7
BRIEF:	
Specification of Errors	9
Argument	10
Letter from Attorney General on Amendment Title 28, Section 421, United States Code Annotated	10
Section 421 Is Mandatory	13
Only One Grand Jury in Federal Districts Not Containing City or Borough With 300,000 Inhabitants	14
Limitation by Statute to Particular Mode Negatives Other Modes	16
A Federal District Court Has Only Powers Given by Statute	17
Only One Jury Commissioner Is Authorized to a District Court by Title 28, Section 412	17
Conclusion	19

INDEX.—(Continued)

Page

Cases Cited:

Atkins v. Fiber Disintegrating Co., 18 Wallace 272 16
Borgia v. United States, 78 F. (2d) 550 18
Botany Worsted Mills v. United States, 278 U. S. 282-289 7, 15
Breese v. United States, 203 F. 824 18
Claussen v. United States, 114 U. S. 487 18
Escoe v. Zerbst, 294 U. S. 490, 494 7, 13
French v. Edwards, 13 Wall. 506, 511 13
Gillis v. California, 293 U. S. 62, 66 16
D. Ginsberg & Sons v. Popkin, 283 U. S. 204, 208 7, 15
Mills, Ex Parte, 135 U. S. 263, 267 16
Pennington v. Coxe, 2 Cranch. 33-59 16
Raleigh & Gaston Railroad Company v. John A. Reid, 13 Wallace 270 15
United States v. Cooper Corporation, 312 U. S. 600, 605 14
United States v. Gale, 109 U. S. 65 8, 18
United States v. Gulf Refining Company, 268 U. S. 542 6
United States v. Lewis, 192 F. 633, 638 8, 18
United States v. Perlstein, 120 F. (2d) 276, 279, 280 19
Wilson, Ex Parte, 114 U. S. 417, 429 17

Statutes Cited:

Act of Congress April 17th, 1940 15
Judicial Code, Section 284 3, 10, 14
United States Code, Title 28, Section 159 4
United States Code, Section 347(a) 6
United States Code, Section 412 4
United States Code, Section 421 3, 6, 9, 10, 15
United States Revised Statutes 810 10

Texts:

House Report 2282, 71st Congress, Third Session 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

JOHN LEN LACY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

The petition of John Len Lacy, with respect shows:

That on April 29th, 1941, a body acting as a grand jury, but ordered to be summoned and convened during the term of court for which a previous grand jury had been lawfully convened and was still existing filed an indictment charging petitioner with endeavoring to influence and impede a juror in the discharge of his duty as a petit juror in a case set for trial June 15th, 1938; in another count with corruptly influencing, obstructing and impeding the administration of justice in the same case, and in still another count, with conspiring with persons,

some named and others allegedly unknown, to corruptly endeavor to influence and impede petit jurors in the discharge of their duties and to corruptly endeavor to influence and impede the administration of justice in the same case. (R. 2-10).

A plea in abatement and in bar was filed on the ground, that the grand jury was ordered to serve while a legal grand jury was already serving, and the Western District of Louisiana did not contain a city, or borough with a population of 300,000 inhabitants, and that the appointment of the second grand jury violated Judicial Code, Section 284 (United States Code, Title 18, Section 421). (R. 11-12).

Also that the lawfully appointed jury commissioner, Adolph Jacobs, did not act in the placing of names in the jury box but another person did, namely, one Dalton, who was appointed subsequent to the duly appointed commissioner who was still acting on the day and date when the purported second grand jury was called. (R. 11).

That a jury trial was held, after the court overruled the above plea, and after such trial, the jury on November 18, 1941, returned a verdict of guilty as charged. (R. 52).

That defendant thereupon filed a motion in arrest of judgment. (R. 25-26).

Thereafter, defendant filed a motion for a new trial (R. 26-28), and on December 8th, 1941, same was overruled and defendant was thereafter sentenced to serve two years "in an institution of the reformatory type to

be designated by the Attorney General or his authorized representative." (R. 28-29).

Notice of appeal was then presented (R. 29-31), and an appeal filed in the United States Circuit Court of Appeals for the Fifth Circuit on May 4th, 1942. (Title page). Said appeal being accompanied by assignment of errors.

Argument was heard on appeal and judgment affirming the conviction was rendered (R. 59-66) on June 18th, 1942.

Motion for rehearing was filed, and overruled July 22nd, 1942. (R. 74). This petition is prosecuted from final judgment.

STATEMENT.

This petition is founded on the statute of the United States known as Section 284, Judicial Code *(United States Code, Title 28, Section 421)*, which reads as follows:

> "No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to a district judge of the district that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury. If the United States attorney for the southern district of New York shall certify in writing to the senior district judge of said district that the exigencies of the public service require it, said judge may, in his discretion, also order a venire to issue for a third

grand jury. The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months: Provided, That, for good cause shown, the court may, at any time after the end of the term for which the grand jury was originally summoned, excuse any member of the grand jury and summon and impanel another person in his place. Nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of crime or offense, or the time during which a person so accused may be held under recognizance before indictment found. Mar. 3, 1911, c. 231, Section 284, 36 Stat. 1165, as amended Feb. 25, 1931, c. 297, 46 Stat. 1417; Aug. 24, 1937, c. 746, 50 Stat. 748; Apr. 17, 1940, c. 101, 54 Stat. 110."

Also involved, is *T. 28, Section 412, U. S. Code.*

The facts on which the plea in abatement and bar is based are not disputed; they are:

1. The District Court for the Western District of Louisiana was created by United States Code 28, Section 159, which provides statutory terms as follows:

   For the Opelousas Division on the First Monday in January and June. For the Alexandria Division the Fourth Monday in January and June. For the Shreveport Division the Third Monday in February and October. For the Monroe Di-

vision the First Monday in April and October, and for the Lake Charles Division on the Third Monday in May and December.

It is to be noted that although the indictment was filed for the Shreveport Division, it states that it was found at Lake Charles, Louisiana. The Western District of Louisiana has no city or borough with 300,000 inhabitants.

2. By stipulation of counsel the following facts were agreed as correct:

   (a) One Adolph Jacobs was duly appointed jury commissioner by the Judge of the Western District of Louisiana on October, 1924, and subsequently other commissioners were appointed; Dalton having been appointed in April, 1932, while Adolph Jacobs, original appointee, was still serving.

   (b) A grand jury was convened by order of the Court for the entire Western District of Louisiana, at Shreveport, Louisiana, on November 4th, 1940.

   For Lake Charles by similar order, for December 16th, 1940.

   For Shreveport by similar order, for February 24th, 1941.

   For Lake Charles by similar order for April 28, 1941.
   That the Grand Jury previously drawn for Shreveport for February was reconvened by similar order issued May 26, 1941, for June 10th, 1941.

   That in each case the Grand Juries were adjourned subject to call.

   That Dalton placed the names in the jury box on April 16th, 1941.

Your petitioner relies on the agreed stipulation as showing:

> That the regular, lawful and valid grand jury, and the only grand jury that had a right to return indictments on April 29th, 1941, was the Shreveport Grand Jury convened at Shreveport, Louisiana, on February 21st, 1941, as the Grand Jury which convened at Shreveport on November 4th, 1940, expired on the Third Monday in January, 1941, and the Grand Jury convened at Lake Charles on December 16, 1940, was a second grand jury without lawful existence. But even if under any circumstance the Grand Jury was lawful when convened, at Lake Charles, on December 19, 1940, which was the Third Monday in December, the date for the Lake Charles statutory term to begin, this said Grand Jury had been adjourned subject to call and was still in existence on April 29th, 1941, which was a date well within the Lake Charles statutory term beginning the Third Monday in December, 1940, and not ending until the Third Monday in May, 1941.

JURISDICTION.

This case involves questions of criminal and constitutional law in which the jurisdiction of the Court of Appeals is final unless this Court subjects such decision to review.

It is contended that this Court has jurisdiction to review the judgment under Section 347 (a) of Title 28 of the United States Code. See *United States v. Gulf Refining Company, 268 U. S. 542.*

QUESTIONS PRESENTED.

1. Under Judicial Code, Section 284 (United States Code, Title 28, Section 421) can a District Court

have two grand juries functioning simultaneously in a Federal District where there is no city or borough containing three hundred thousand inhabitants?

2. Will an indictment found by such second grand jury have any legal force and validity?
3. In any event will an indictment found by a second grand jury convened in a Division of the Court, wherein a first grand jury has been convened and is still subject to call and not discharged, be valid, and subject a defendant to trial and authorize conviction?
4. Can a court appoint more than one jury commissioner for a judicial District?

REASONS RELIED ON FOR GRANTING WRIT.

1. There is here involved an important and fundamental question of Federal law which has never been directly passed on by the Supreme Court of the United States, and should be settled by it.
2. The decision herein is in conflict with applicable decisions of the Supreme Court which bear upon matters herein involved, and especially *Botany Worsted Mills v. United States, 278 U. S. 282, 289:*

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode;" and

D. Ginsberg & Sons v. Popkin, 283 U. S. 204, 208:

> "General language of a statutory provision although broad enough to include it will not be held to apply to matters specifically dealt with in another part of the same enactment;" and

Escoe v. Zerbst, 295 U. S. 490, 494:

> "Statutes are not directory, when to put them in that category would result in the serious

impairment of the public or private interests that they were intended to protect."

3. The decision herein is in conflict with *United States v. Gale, 109 U. S. 65*, and *United States v. Lewis, 192 Fed. 633, 638*, holding that a Grand Jury must be selected by officers invested with the power, and disregard of this is a matter of substance.

Petitioner herewith presents, as part of this petition, transcript of record in the Circuit Court of Appeals for the Fifth Circuit.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket No. 10,167, T. L. Morris and John Len Lacy, Appellants, v. United States of America, Appellee, and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Court and that your petitioner be discharged without day and have such other and further relief in the premises as this Honorable Court may deem just and proper.

FRANK J. LOONEY,
Attorney for Petitioner.

Of Counsel:
BEN F. ROBERTS,
J. RALPH GOFF.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered June 18th, 1942. (R. 59).

Petition for rehearing was denied July 22nd, 1942.

The jurisdiction of this Court is invoked under Title 28, Section 347 of the United States Code.

The facts have been fully set forth in the petition for Writ of Certiorari, pages 1-8, *supra.*

SPECIFICATION OF ERRORS ASSIGNED.

I.

The Circuit Court of Appeals for the Fifth Circuit erred in holding that the provisions of Section 421, Title 28, United States Code, were directory, and not mandatory.

II.

The said Court erred in holding that more than one Grand Jury could be lawfully convened and act while a previous grand jury was adjourned subject to call and still in existence in the Western District of Louisiana, and also in treating divisions of the District as separate District Courts.

III.

The said Court erred in holding that an indictment found by such subsequently called Grand Jury would be valid.

IV.

The Court erred in holding that any number of jury commissioners could be appointed in a judicial district and a jury box could be filled by any other than the first appointed Commissioner who was still acting.

ARGUMENT.

Section 421 of Title 28, United States Code, was originally Section 810 of the United States Revised Statutes, and became Judicial Code, Section 284. After receiving this number, several amendments have been made, only one of which will be now considered, since the reason for this amendment is here pertinent.

I.

In the Seventy-first Congress a bill numbered Senate Bill 4425 was introduced for the purpose of obtaining Congressional authorization for a third Grand Jury in the Southern District of New York.

An explanation of this bill is contained in a letter from the then Attorney General William D. Mitchell, which letter was embodied in the House Report No. 2282, made to the Seventy-first Congress, Third Session. This was submitted by the Committee on Judiciary on January 15th, 1931, with this statement:

> "This bill was introduced at the request of the Attorney General, the need and effect of the Legislation is set out in a letter dated April 25, 1930, from

the Attorney General to Honorable George W. Norris, Chairman of the Senate Judiciary Committee."

This letter as thus reported reads:

"Department of Justice
Washington, D. C. April 25, 1930

Hon. George W. Norris
Chairman Committee of the Judiciary
United States Senate

My dear Senator:

Inclosed herewith are copies of letters dated March 11th and April 14, 1930 from the United States Attorney Charles H. Tuttle of the Southern District of New York, in which he recommends the enactment of a law to permit more than two grand juries to be in session simultaneously in the Southern District of New York. Also a copy of a letter from former United States Attorney Buckner of the Southern District of New York, dated March 26, 1926, making the same recommendation.

These communications convince me that the suggested amendment should be enacted.

Existing law (Section 284 of the Judicial Code), Section 421, Title 28, United States Code, authorizes a second grand jury in districts having a city or borough of at least three hundred thousand inhabitants, but has been held in the Southern District of New York not to authorize the impaneling of a third grand jury. During the Sixty-ninth Congress this department recommended an amendment of Section 284 which would have authorized the summoning of additional grand juries without limit in populous districts, where the exigencies of the public service required such action. The Department did not, however, press that recommendation. I now suggest and recommend the enactment of an

Amendment to Section 284 to authorize a third grand jury in the Southern District of New York only.

* * * * * * * * *

Respectfully,

William D. Mitchell
Attorney General."

Attached to this letter were letters:

1. To the Attorney General from Emory R. Buckner, United States Attorney, dated New York, March 26, 1926.
2. To the Attorney General from Charles H. Tuttle, dated New York City, March 11, 1930.
3. To the Attorney General (Attention Hon. Charles P. Sisson) from Charles H. Tuttle dated New York City, April 14, 1930.

Found in Volume of House Reports on Public Bills, etc.

Seventy-first Congress
Third Session"

It will be noted that its significance here is emphasized by the sentence in the letter which reads,

"During the Sixty-ninth Congress this Department recommended an amendment of Section 284 which would have authorized the summoning of additional grand juries without limit in populous districts, where the exigencies of the public service required such action. The Department did not, however, press that recommendation."

It is also highly significant that the Attorney General stresses his recommendation of the amendment to authorize a third grand jury by the use of the final word

in the phrase "in the southern district of New York *only*." (Italics ours).

Further argument would appear superfluous but we beg to submit to this Court certain authorities whose reasoning it would be hard to reconcile with the holdings of the Circuit Court of Appeals.

On page 7 of the Court's opinion (R. 65) the Court said:

> "We think the statute as to the number of grand juries permissible in the different situations named in it, was only directory, and not intended to impose mandatory restrictions on the judge."

It is clear that the Attorney General and the Congress of the United States did not consider Section 284, Judicial Code (now Title 28, Section 421, United States Code) as anything but mandatory for if it were directory, then the amendment adopted by the 71st Congress on February 25th, 1931, was unnecessary and a futile waste of time on the part of the Congress and the Judiciary Department.

In *Escoe v. Zerbst, 295 United States 490, 494*, the Court said:

> "Statutes are not directory when to put them in that category would result in serious impairment of the public or private interests that they were intended to protect."

Also, in an early case, *French v. Edwards, 13 Wall. 506, 511:*

> "When the requisitions prescribed are intended for the protection of the citizen * * * and by a dis-

regard of which his rights might be and generally would be injuriously affected they are not directory, but mandatory."

II.

On pages 4 and 5 of the Circuit Court's opinion (R. 62-63) it is said:

"Its other point that in a district composed of divisions as this district is, there may be only one grand jury summoned for the entire district * * * is no better taken."

In *United States v. Cooper Corporation, 312 U. S. 600, 605*, the Court said:

"It is not our function to engraft upon a statute conditions which we think the Legislature logically might or should have made." *Ebert v. Poston, 268 U. S. 548, 554*, is cited and is pertinent here.

We again refer to the House Report previously quoted and the letter from the Attorney General.

We call attention to the language of the Section 421 in which a second grand jury is authorized in districts having a city or borough with 300,000 inhabitants.

As at first written in Section 284, this sentence read:

"If the United States Attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing the district judge, or the senior judge of the District that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury."

This language was continued in United States Code. When this section was amended by Act April 17, 1940, there was a slight change made and the words "or the senior judge" were stricken out and "the" before district judge changed to "a"; but no change was made authorizing a second grand jury in either division or district which did not contain a city or borough of 300,000 inhabitants.

This demonstrates that neither Congress nor the Attorney General have seen fit to reoffer the recommendation which the Attorney General states was made to the 69th Congress to grant districts which were "populous" the right to have "grand juries without limit."

Title 28, Section 421, United States Code, specifically limits the authority to summon second grand juries to districts having a city or borough containing 300,000 inhabitants.

In the recent case of *Botany Worsted Mills v. United States, 278 U. S. 282,* on *page 289,* this Court said:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

This identical language is used in the *Raleigh and Gaston Railroad Company v. John A. Reid* case, *13 Wallace, 270,* which is cited.

In *D. Ginsberg & Sons v. Popkin, 285 U. S. 204, 208:*

> "General language of a statutory provision although broad enough to include it will not be held to apply to a matter specifically dealt with in another part of the same enactment * * *. Specific terms pre-

vail over the general in the same or another statute which otherwise might be controlling," citing authorities.

And in *Atkins v. Fiber Disintegrating Company, 18 Wall. 272,* on *page 302:*

"The general language found in one place, may be restricted in its effect to the particular expressions employed in another, if such upon a careful examination of the subject, appear to have been the intent of the enactment."

In *Pennington v. Coxe, 2 Cranch 33,* on *page 59,* the Court said:

"Where the legislature distinguishes between different objects * * * it is not for the court to beat down these distinctions."

III.

No indictment could be valid unless found by a grand jury convened according to law, otherwise the constitutional guarantee would be of no effect.

In *Gillis v. State of California, 293 U. S. 62, 66,* the Court said:

"The accepted doctrine is that the lower Federal Courts were created by the Act of Congress and their powers and duties depend upon the acts which called them into existence or subsequent ones which extend or limit."

In *Ex Parte Mills, 135 U. S. 263, 267:*

"A grand jury by which presentments or indictments may be made for offenses against the United States is a creature of statute. It cannot be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal."

Page 270. "This is not a case of mere error, but one in which the court below transcended its powers."

In *Ex Parte Wilson, 114 U. S. 417*, the Court held, *page 429:*

"Our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment of the Constitution, and that the District Court in holding the petitioner to answer for such a crime and sentencing him to such imprisonment, without indictment or presentment by a grand jury exceeded its jurisdiction and he is therefore entitled to be discharged."

IV.

The evidence shows that Adolph Jacobs was appointed Jury Commissioner in 1924 and was still performing the duties of the office and that Dalton was appointed in 1932 (R. 13), and that Dalton placed the names in the jury box out of which were drawn the names of those who acted as Grand Jurors April 29th, 1941, and presented the indictment (R. 14).

It is true that one district court has held that more than one jury commissioner may be appointed, but the language of the Statute does not justify this construction, inasmuch as it reads:

"A commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner, etc. Title 28, Section 412, United States Code."

The word "A" is deliberately used and the words "which commissioner" refer to a single commissioner.

Any other construction would do violence to the English language. The last sentence in the above quoted section requires "said commissioner" to alternate with the Clerk or his deputy in placing names in the jury box.

In *United States v. Gale, 109 U. S. 65,* the Supreme Court on *page 71,* said:

> "There are cases undoubtedly * * * which objection to the grand jury can be taken at any time. These are where the * * * jury * * * has been selected by persons having no authority whatever to select them."

In *United States v. Lewis, 192 Fed. 633, 638:*

> "The selection of a grand jury by the officers who by law are the only ones invested with that power, is not a mere defect or imperfection of form. It is a matter of substance which cannot be disregarded without prejudice to an accused."

V.

The Circuit Court cites *Claussen v. United States, 114 U. S. 487,* but the reference is inappropriate, because courts were not then acting under such a statute as Title 28, Section 421 of the United States Code; furthermore, the point was not the same and it was not the same in *Breese v. United States, 203 Fed. 824* (see judgment, pages 4-5, R. 62, 63).

In *Borgia v. United States, 78 F. (2d) 550* (Judgment, page 3, footnote, R. 61), the question was as to the continuance of a grand jury, and the court also in its opinion laid special stress on the fact that the district was one in which there was a city containing 300,000 inhabitants.

United States v. Perlstein, 39 F. (2d) 965, referred to (judgment, p. 7), (R. 65) was before the Circuit Court of Appeals in *120 F. (2d) 276*, where the court said the question was whether an investigation had been begun before a jury term expired (p. 279), and there said:

> "The date when the grand jury began its investigation as to these defendants does not appear in the record,"

and on *page 280:*

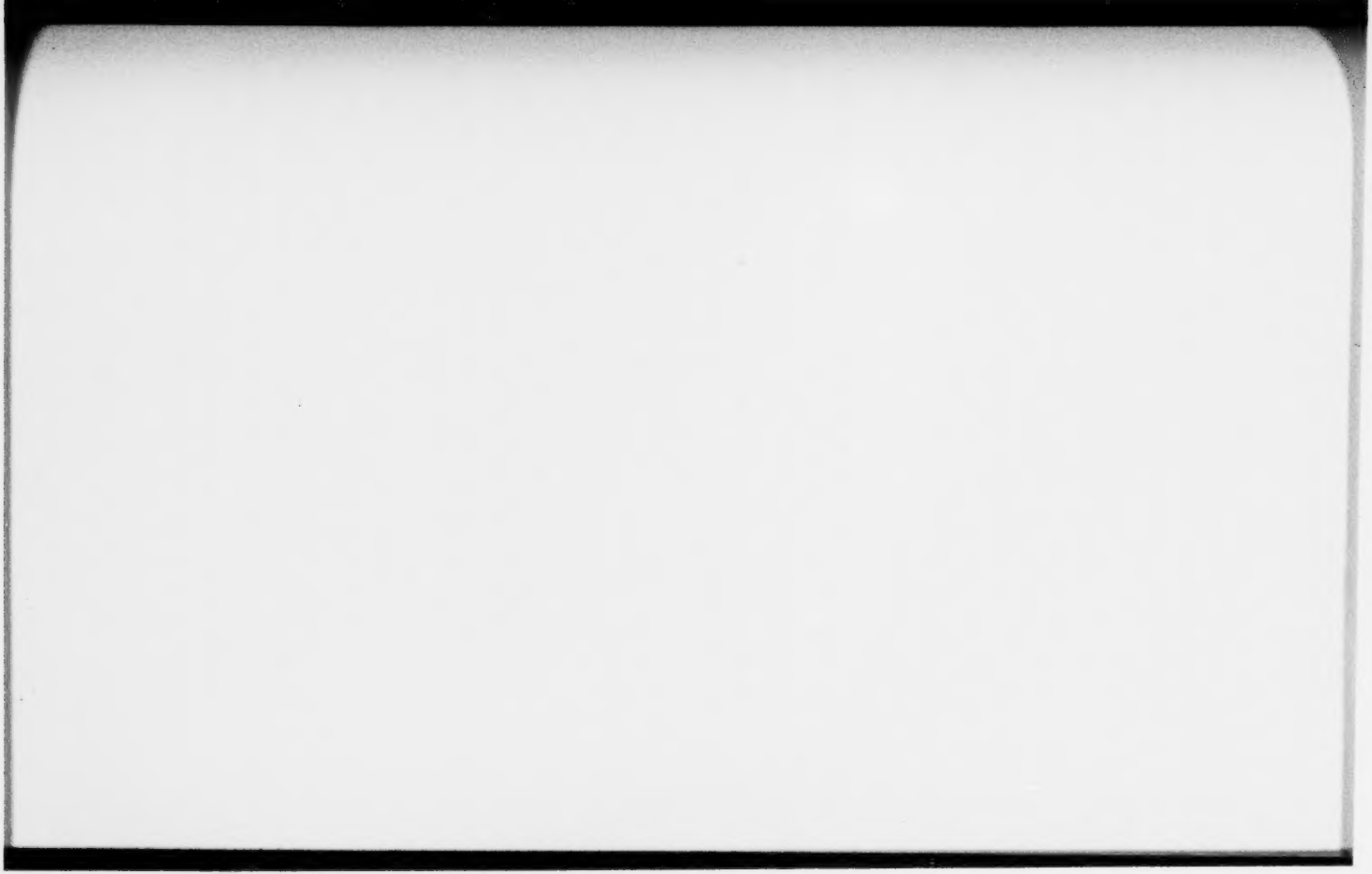
> "There were presented to the court in support of the motions neither record facts, admissions by the Government nor affidavits by persons acquainted with the facts. Because of this fact of verification the motions to quash were properly denied."

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be granted and the Honorable Supreme Court of the United States, after hearing, should reverse the judgment of the Circuit Court of Appeals for the Fifth Circuit, and order defendant discharged.

FRANK J. LOONEY,
Attorney for Petitioner.

Of Counsel:
BEN F. ROBERTS,
J. RALPH GOFF.



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	12
Appendix	13

CITATIONS

Cases:	
Borgia v. *United States*, 78 F. (2d) 550, certiorari denied, 296 U. S. 615	7
United States v. *Johnson*, 123 F. (2d) 111	11
United States v. *Perlstein*, 39 F. Supp. 965	7, 11
United States v. *Rockefeller*, 221 Fed. 462	9
Statutes:	
Act of March 28, 1910, c. 134, 36 Stat. 267	6
Act of February 25, 1931, c. 297, 46 Stat. 1417	2, 7
Criminal Code, sec. 37 (18 U. S. C. 88)	4
Criminal Code, sec. 135 (18 U. S. C. 241)	4
Judicial Code, sec. 11 (28 U. S. C. 15)	11
Judicial Code, sec. 84 (28 U. S. C. 159)	7
Judicial Code, sec. 97 (28 U. S. C. 178)	9
Judicial Code, sec. 276 (28 U. S. C. 412)	9
Judicial Code, sec. 284 (28 U. S. C. 421)	2, 6
Revised Statutes (1878), sec. 810	6
Misc.:	
H. Rep. No. 290, 61st Cong., 2d sess	9

483438—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 310

JOHN LEN LACY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 58–65) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 18, 1942 (R. 65), and a petition for rehearing (R. 66–71) was denied July 22, 1942 (R. 72). The petition for a writ of certiorari was filed August 17, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of Feb-

ruary 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether Section 284 of the Judicial Code, as amended, prohibits concurrent grand juries in different divisions of the same judicial district.

2. Whether the summoning of a grand jury on April 28, 1941, for the Lake Charles division of the western district of Louisiana, was illegal because the grand jury previously convened for the regular December 1940 term of the same division had not been discharged and the regular May 1941 term of the division had not yet begun, a special term, however, having begun on April 28, 1941.

STATUTE INVOLVED

Section 284 of the Judicial Code, as amended by the Act of February 25, 1931, c. 297, 46 Stat. 1417 (28 U. S. C. 421), so far as pertinent here, provides:

> No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to a district judge of the district that the exigencies of the public service require

it, the judge may, in his discretion, also order a venire to issue for a second grand jury. If the United States attorney for the southern district of New York shall certify in writing to the senior district judge of said district that the exigencies of the public service require it, said judge may, in his discretion, also order a venire to issue for a third grand jury. The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months: * * *.

STATEMENT

Petitioner and one Morris were indicted on April 29, 1941, by a grand jury which had been summoned to inquire for the western district of Louisiana at a term of the district court begun and held at Lake Charles, Louisiana, on April 28, 1941 (R. 2). Petitioner was convicted (R. 52) on two counts charging the substantive offenses of corruptly endeavoring to influence and impede a petit juror in the discharge of his duty, and cor-

ruptly endeavoring to influence, obstruct, and impede the administration of justice (Criminal Code, sec. 135, 18 U. S. C. 241), and on another count charging a conspiracy to commit the substantive offenses (Criminal Code, sec. 37, 18 U. S. C. 88) (R. 2–4, 5–10);[1] he was sentenced generally to imprisonment for two years (R. 54).

Petitioner attacked the validity of the indictment by plea in abatement (R. 11–12), which was overruled (R. 14–15), the grounds therefor being the same as two of those which are here relied upon and which are discussed in the Argument, *infra,* pp. 6–9. In connection with the questions raised by the plea, the following facts were stipulated (R. 13–14):

> In this cause it is stipulated and agreed by and between the United States Attorney and counsel for defendants that Adolph Jacobs was duly appointed Jury Commissioner in October, 1924, by Honorable Ben C. Dawkins, Judge of this Court.
>
> That the said Jacobs is still serving in this capacity, and that the other four Commissioners for the Western District of Louisiana were appointed at various dates later, and the said Dalton, who was the

[1] The indictment was in five counts. Petitioner was charged with separate substantive offenses in counts 1 and 2 (R. 2–4), and Morris was charged with separate substantive offenses in counts 3 and 4 (R. 4–5). Both defendants were charged with conspiracy in count 5 (R. 5–10). Morris was convicted on counts 3, 4, and 5 (R. 52) but did not appeal (R. 59).

Commissioner drawing the jury in Lake Charles in April, 1941, was appointed Commissioner by the Honorable Ben C. Dawkins, Judge of this District in April, 1932.

That on October 19th, 1940, an order was issued by this Court convening a Grand Jury for the entire Western District of Louisiana, to be held at Shreveport, Louisiana, on November 4th, 1940.

That on November 22nd, 1940, an order was issued by this Honorable Court calling and convening a Grand Jury for the entire Western District of Louisiana to be held at Lake Charles on December 16th, 1940.

That on February 7th, 1941, an order was issued convening a Grand Jury for the entire Western District of Louisiana to be held at Shreveport on February 24th, 1941.

That on April 11th, 1941, an order was issued by this Honorable Court calling and convening a Grand Jury to be held at Lake Charles on April 28th, 1941.

That on May 26th, 1941, an order was issued recalling the Grand Jury previously drawn in order of date, February 7th, 1941, to be held for the entire Western District of Louisiana at Shreveport, Louisiana, on June 10th, 1941.

That in each case the Grand Juries were adjourned subject to call.

That the names placed in the Jury Box at Lake Charles and from which the Jury was drawn at Lake Charles on April 16th, 1941, and on December 20th, 1940, were

placed therein by a Deputy Clerk and the said Dalton, acting as Commissioner.

ARGUMENT

Petitioner contends that under Section 284 of the Judicial Code (28 U. S. C. 421, *supra*, pp. 2–3), only one grand jury may be convened and sitting, or subject to call, at one time in a judicial district, unless the district has a city or borough containing at least 300,000 inhabitants; he argues that since the western district of Louisiana has no city or borough of such size, the district court had no authority to convene the grand jury at Lake Charles on April 28, 1941—the grand jury which indicted him on April 29—because the grand jury previously convened at Shreveport on February 24, 1941, had not yet been discharged (Pet. 6, 9, 14–16). This contention is without merit.

Section 284 was originally Section 810 of the Revised Statutes (1878) and, so far as pertinent here, contained only the first and fourth sentences quoted above (*supra*, pp. 2–3) providing for summoning of a grand jury by the district court "in term" to serve at and for such time as the court might direct. The second sentence providing for a second grand jury in a district containing a city or borough of at least 300,000 people was added by the Act of March 28, 1910, c. 134, 36 Stat. 267, and the section as so amended was subsequently enacted as Section 284 of the Judicial Code (Act of March 3, 1911, c. 231, sec. 284, 36 Stat. 1087, 1165). The third sentence providing

for a third grand jury in the southern district of New York was added by the Act of February 25, 1931, c. 297, 46 Stat. 1417.[2]

We think it is clear that under the provision of the fourth sentence the district court is authorized to summon a grand jury to serve at each term of court held in the district. As Circuit Judge Maris held in *United States* v. *Perlstein,* 39 F. Supp. 965, 971 (D. N. J.), "the statute contemplates that there may be a grand jury serving at each term of court, regular or special, which is being held in the judicial district at a given time, but, except as specially permitted, never more than one at the same place of holding court." Cf. *Borgia* v. *United States,* 78 F. (2d) 550, 552–553 (C. C. A. 9), certiorari denied, 296 U. S. 615. Hence, the statute on its face authorizes concurrent grand juries at various places in a one-division district during different terms and, *a fortiori,* in different divisions of a multiple-division district. The western district of Louisiana is divided into five divisions [3] and, consequently, the

[2] This amendment also added the fifth sentence empowering a district judge to authorize a grand jury to sit during the term succeeding that for which it was convened to finish investigations begun but not finished during the term.

[3] Section 84 of the Judicial Code (28 U. S. C. 159) designates the five divisions and prescribes the terms of court therein, as follows:

"* * * Terms of the district court for the Opelousas division shall be held at Opelousas on the first Mondays in January and June; for the Alexandria division, at Alexandria on the fourth Mondays in January and June; for the

483438—42——2

district court for that district may summon grand juries to serve simultaneously in the different terms of court held in the various divisions. It is therefore immaterial that the grand jury convened for the statutory February 1941 term at Shreveport had not been discharged when the jury which indicted petitioner was convened for the term beginning April 28, 1941, at Lake Charles.

There is nothing in the amendments adding the second and third sentences of Section 284 which requires the construction for which petitioner contends. Those provisions merely authorize, in certain districts, more than one grand jury to be summoned to serve simultaneously during the same term of court. Petitioner argues that certain portions of the legislative history of the amendment of February 25, 1931, which added the provision for a third grand jury in the southern district of New York, support his contention (Pet. 10–13). However, there is nothing in the Attorney General's letter to the Chairman of the Senate Judiciary Committee proposing the amendment, upon which petitioner relies (Pet. 11–12), which indicates that the Attorney General doubted the authority of the district courts to summon grand juries to serve simultaneously in

---

Shreveport division, at Shreveport on the third Mondays in February and October; for the Monroe division, at Monroe on the first Mondays in April and October; and for the Lake Charles division, at Lake Charles on the third Mondays in May and December."

different divisions of the same district.[4] The Attorney General was concerned only with permitting "more than two grand juries to be in session simultaneously in the Southern District of New York" (see Pet. 11), which is a one-division district (Judicial Code, sec. 97, 28 U. S. C. 178).

Nor does the earlier amendment of March 28, 1910, providing for a second grand jury in a district containing a city or borough of at least 300,000 people, support petitioner's contention. The legislative history of the amendment shows that its sole purpose was to relieve congestion of criminal dockets by "providing for two grand juries to sit concurrently during the same term."[5] There is no indication in the history of the amendment that Congress intended thereby to prohibit the summoning of separate grand juries to serve concurrently in different divisions of the same district.[6]

---

[4] It is obvious that if, as petitioner argues (Pet. 13), the Attorney General had any such doubt he would have pressed the recommendation made to the Sixty-ninth Congress for additional grand juries without limit in populous districts, to which he referred in his letter (see Pet. 11), or some other corrective provision.

[5] H. Rep. No. 290, 61st Cong., 2d sess., p. 2.

[6] Petitioner's contention (Pet. 8, 10, 17–18) that only one jury commissioner at one time is authorized for a judicial district is likewise unsound. The statute involved (Judicial Code, sec. 276, 18 U. S. C. 412) imposes no such limitation and, as pointed out by the court below (R. 61), "*United States* v. *Rockefeller*, 221 Fed. [462] 465 [S. D. N. Y.] is direct authority to the contrary." Certificates of the clerk

II

As petitioner also points out, however (Pet. 4–6), the statutory terms for the Lake Charles division of the western district of Louisiana begin on the third Mondays in December and May (Judicial Code, sec. 84, *supra*, p. 7, n. 3); the grand jury which had been convened at Lake Charles on the third Monday in December 1940 (December 16) had not yet been formally discharged, and the next statutory term of court at Lake Charles had not yet begun, when the grand jury which indicted petitioner was convened there on April 28, 1941 (R. 13–14). Although he does not make the contention entirely clear, petitioner questions the validity of his conviction on an indictment which he implies was returned by a second grand jury convened at a term of the court wherein a previously summoned grand jury was still subject to call and had not been discharged. (See Pet. 6, 7.)

This challenge to the validity of the indictment, however, is predicated upon the assumption that the grand jury of April 28, 1941, was convened

---

of the district court printed in the appendix to the Government's brief in the circuit court of appeals show that there is a jury commissioner for each division of the western district of Louisiana, that Adolphe Jacobs was appointed commissioner for the Opelousas division in 1924, and that Ira Dalton was appointed for the Lake Charles division in 1933. (See also, R. 13.)

for the Lake Charles December 1940 term of the district court. But, as shown by the records of the court set out in the Appendix, *infra*, pp. 13–18,[7] the grand jury which returned the indictment was summoned for a *special* term of the district court commencing April 28, 1941, at Lake Charles, as permitted by Section 284 of the Judicial Code (*supra*, pp. 2–3). The court was, of course, authorized to call the special term (Judicial Code, sec. 11, 28 U. S. C. 15), and the calling of that term automatically terminated the Lake Charles December 1940 term (*United States* v. *Perlstein*, 39 F. Supp. 965, 968–969 (D. N. J.), and cases cited). Hence, the authority of the first grand jury had ceased, for no order for its continuance was issued and such an order was necessary to give it "vitality subsequent to the term at which it is originally empaneled." *United Staes* v. *Johnson*, 123 F. (2d) 111, 118 (C. C. A. 7); Judicial Code, sec. 284, supra, p. 3.[8]

---

[7] In the Appendix, *infra*, pp. 13–18, we have copied from the appendix to the Government's brief in the circuit court of appeals Government Exhibits J–1, J–2, J–3 and J–4, which show that the grand jury which returned the indictment was convened on April 28, 1941, by order of the district court to serve for a special term beginning on that date.

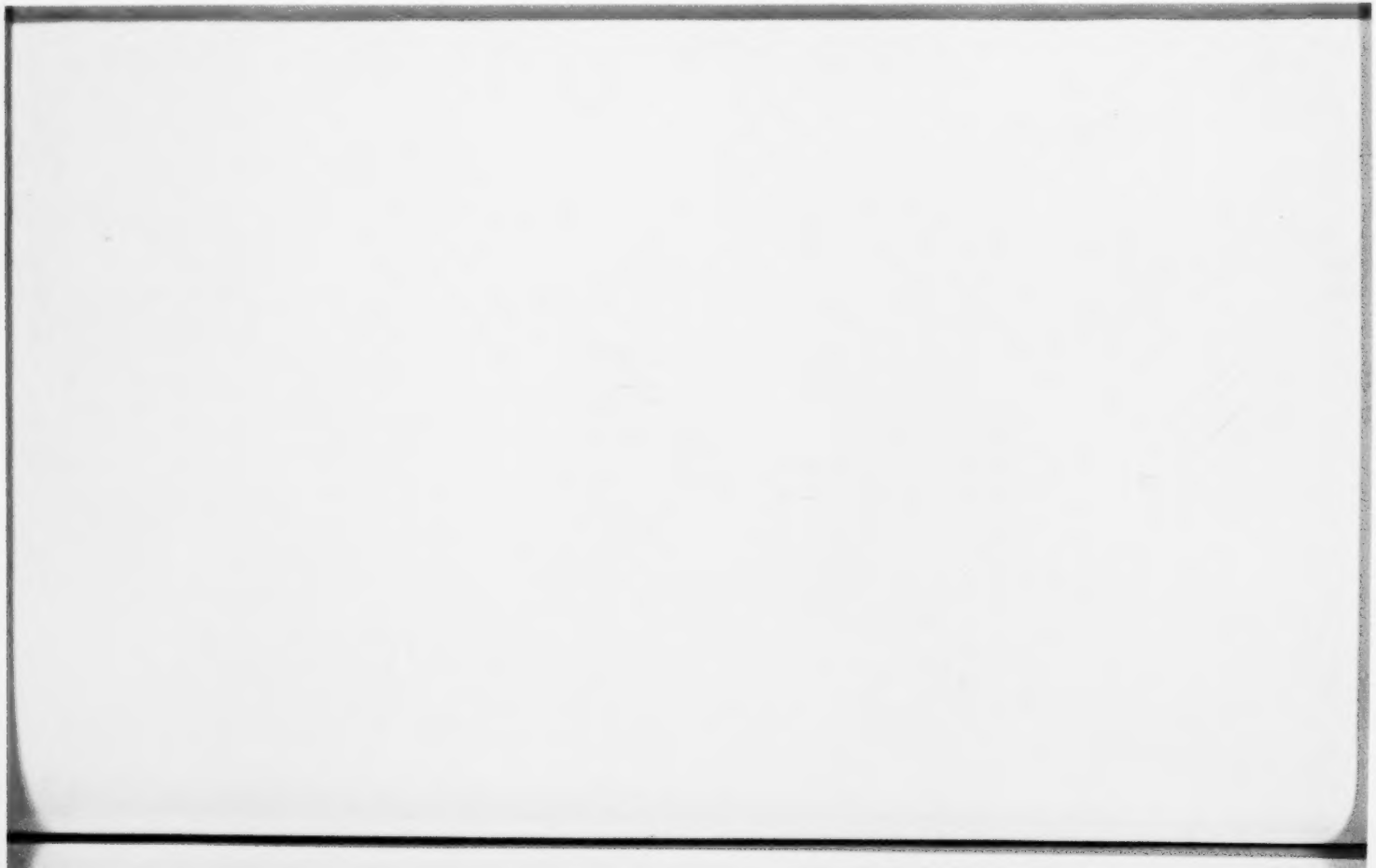
[8] The opinion below does not expressly consider this question, probably because petitioner did not urge it (see R. 61).

CONCLUSION

The decision below is correct and the petition for a writ of certiorari presents no question calling for review by this Court. It is respectfully submitted, therefore, that the petition should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
ANDREW F. OEHMANN,
Attorneys.

SEPTEMBER 1942.



APPENDIX

EXHIBIT J-1

U. S. District Court
Western District of Louisiana
Filed
At Monroe, La.
Apr. 11, 1941
E. C. Jackson, Clerk
Chas. B. Fisher, Dy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

To the Honorable Ben C. Dawkins and Gaston L. Porterie, Judges of the United States District Court for the Western District of Louisiana:

The petition of the United States, through its counsel, Harvey G. Fields, United States Attorney, and Malcolm E. Lafargue, Assistant United States Attorney, with respect represents:

That at the coming term of the Court at Lake Charles, Louisiana, there are several charges to be investigated, and that it will be necessary to have a grand jury impaneled for the entire district; and it will likewise be necessary to have a petit jury summoned for the trial of certain cases.

WHEREFORE, petitioner prays for an order for the summoning of the grand and petit juries for the Western District of Louisiana and for a term to begin at Lake Charles, Louisiana, on Monday,

April 28, 1941, and suggests 25 persons for grand jury and 35 persons for petit jury service.

HARVEY G. FIELDS,
United States Attorney.
MALCOLM E. LAFARGUE,
Assistant United States Attorney.

ORDER

Considering the foregoing petition:

IT IS ORDERED that a grand jury panel, composed of 25 persons, be drawn for service as grand jurors, and a petit jury panel, composed of 35 persons, be drawn for service as petit jurors, to serve in this Court for this District for the term which is hereby called beginning at Lake Charles, Louisiana, at 10 o'clock a. m. Monday, April 28, 1941, and there to remain until further orders of this Court.

THUS DONE AND SIGNED at Monroe, Louisiana, on this the 11th day of April 1941.

G. L. PORTERIE, *Judge.*

EXHIBIT J–2

PROCESS VERBAL OF DRAWING OF GRAND JURY

U. S. District Court,
Western District of Louisiana.
Filed
Apr. 16, 1941.
E. C. Jackson, Clerk.
M. E. H., Dy.

DISTRICT COURT OF THE UNITED STATES

WESTERN DISTRICT OF LOUISIANA

FIFTH JUDICIAL CIRCUIT

LAKE CHARLES, LOUISIANA, APRIL 28,
SPECIAL TERM A. D. 1941.

BE IT REMEMBERED that on this 15th day of April, A. D. 1941, there were present in the Court Room, Ira M. Dalton, Esq., the regularly appointed and duly qualified Jury Commissioner for the Lake Charles Division of the United States District Court for the Fifth Circuit and Western District of Louisiana; and Seaman M. Mayo, Deputy Clerk of the said United States District Court, and Rene Fuselier, Deputy United States Marshal for said District, and the names of over three hundred (300) persons possessing the qualifications of jurors, residing in the Parishes of Acadia, Allen, Beauregard, Calcasiue, Cameron, Jefferson Davis, and Vernon, were previously placed in the jury box in the manner prescribed by law and the rules of this Court by said Jury Commissioner and said Deputy Clerk, and the said Jury Commissioner proceeded to draw from said box in the manner prescribed by law and the rules of this Court, the names of twenty-five (25) persons to serve as Grand Jurors at the April 28, Spl. Term, A. D. 1941, of the said United States District Court, the names of said Grand Jurors being as follows:

* * * * *

IN WITNESS WHEREOF, we have hereunto signed our names at the City of Lake Charles, Louisiana, this 15th day of April, A. D. 1941.

IRA M. DALTON,
Jury Commissioner.
S. M. MAYO,
Deputy Clerk, U. S. District Court.
RENE FUSELIER,
Deputy United States Marshal.

[SEAL]

EXHIBIT J–3

Writ of Venire

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

FIFTH JUDICIAL CIRCUIT

THE PRESIDENT OF THE UNITED STATES OF AMERICA

U. S. District Court,
Western District of Louisiana.
Filed.
Apr. 16, 1941.
E. C. Jackson, Clerk.
M. E. H., Dy.

To the Marshal of the Western District of Louisiana—

GREETING:

YOU ARE HEREBY COMMANDED that you cause to come before the District Court of the United States for the Fifth Circuit and Western District

of Louisiana, in said Western District of Louisiana, on Monday, the 28 day of April, A. D. 1941, at 10 o'clock a. m., then and there to serve as Grand Jurors during the Special Term A. D. 1941, thereof, the following-named good and lawful men of the district:

* * * * *

And of your acts and doings herein that you make due return upon this writ, and hereof fail not at your peril.

WITNESS the Honorable CHARLES EVANS HUGHES, Chief Justice of the United States, at the City of Lake Charles, Louisiana, on this the 15th day of April, A. D. 1941, and of the Independence of the United States of America the one hundred and 65th year.

S. A. MAYO,
Deputy Clerk, U. S. District Court,
Fifth Circuit, Western District of Louisiana.

EXHIBIT J–4

U. S. District Court
Western District of Louisiana
Filed
Apr. 17, 1941
E. C. Jackson, Clerk

MARSHAL'S RETURN ON VENIRE

Marshal's Docket No. 17166.

Received this writ April 16, 1941, at Shreveport, Louisiana, and executed same as herein commanded April 16, A. D. 1941, by causing to be summoned to appear for service as Grand Jurors

for the Spc. April Term, A. D. 1941, of the United States District Court at Lake Charles, Louisiana, the following-named persons in the manner indicated: (P) Personal Service; (D) Domiciliary Service; (M) Service by mailing Form No. 58.

* * * * * *

LOUIS E. LEBLANC,
U. S. Marshal.
By JOSEPH W. KEENE,
Chief Deputy U. S. Marshal.

U. S. GOVERNMENT PRINTING OFFICE: 1943

(19)

Office - Supreme Court, U. S.
FILED
SEP 23 1942
CHARLES ELMORE CROPLEY
CLERK

No. 310

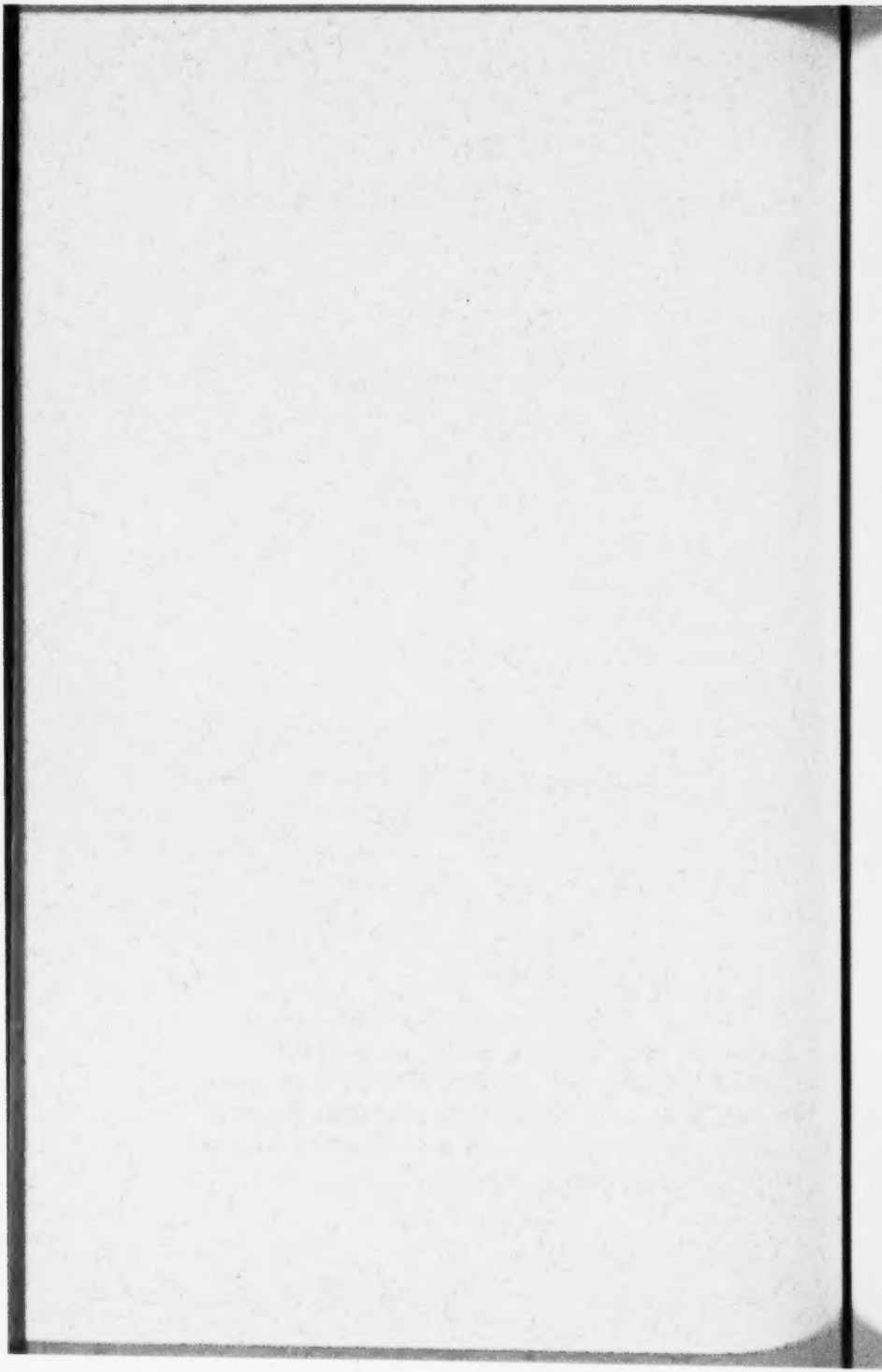
In the Supreme Court of the United States

OCTOBER TERM, 1942

JOHN LEN LACY, PETITIONER

vs.

UNITED STATES OF AMERICA



In the
Supreme Court of the United States

OCTOBER TERM, 1942

No. 310

JOHN LEN LACY, PETITIONER

vs.

UNITED STATES OF AMERICA

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES

Now comes John Len Lacy, petitioner in the above numbered and entitled cause and moves and prays this Honorable Court to grant permission to file this reply brief to the brief of the United States in opposition to the petition for Writ of Certiorari hereinbefore filed.

FRANK J. LOONEY,
Attorney for Petitioner.

BRIEF

The brief of the United States is misleading in its citation of authorities, especially in the citation of UNITED STATES VS. PERLSTEIN, 39 Fed. Supp. 965, which case was reviewed by the Circuit Court of Appeals, and reference to same is made in the original brief of this appearer.

Attention is now called to the case of JONES VS. UNITED STATES, 162 Fed. 417, certiorari being denied therein in 212 United States 576. In this case the court held that:

> "A grand jury can be discharged only by direct order of the court, or by final adjournment of the court for the term for which the jury is empaneled." 421.

In the present case, as shown by brief of Government (page 5).

> "The grand juries were adjourned subject to call."

In UNITED STATES VS. PHILADELPHIA, ETC. RAILROAD, 227 Fed. 206, the court cited Judicial Code 285 (United States Code, Title 28, Section 422):

> "The District Courts may discharge, etc."

and followed this citation with the statement:

> "Until discharged by the court, the grand jury therefore continues to exist until the end of the term even though it does not continue in session."

In McDOWELL VS. UNITED STATES, 159 U. S. 596, 602, the court said:

> "The fact that in the recital of the proceedings the term is spoken of as a special term is immaterial in face of the statement that the regular term was opened on February 5th, and continued from day to day until after the proceedings complained of had taken place."

In the former brief petitioner shows that the statutory term of court for Lake Charles included the date on which the first grand jury was empaneled and the second grand jury which found the indictment was empaneled and the mere use of the words "special term" could in no wise change the law if the court should hold that grand juries could be empaneled in separate divisions of the district, even though the statute does not authorize such a course for the district itself.

It is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

FRANK J. LOONEY,
Attorney for Petitioner.

OF COUNSEL:
J. R. Goff
Ben F. Roberts

Office - Supreme Court, U. S.
FILED
OCT 28 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 310

JOHN LEN LACY,

Petitioner,

versus

UNITED STATES OF AMERICA,

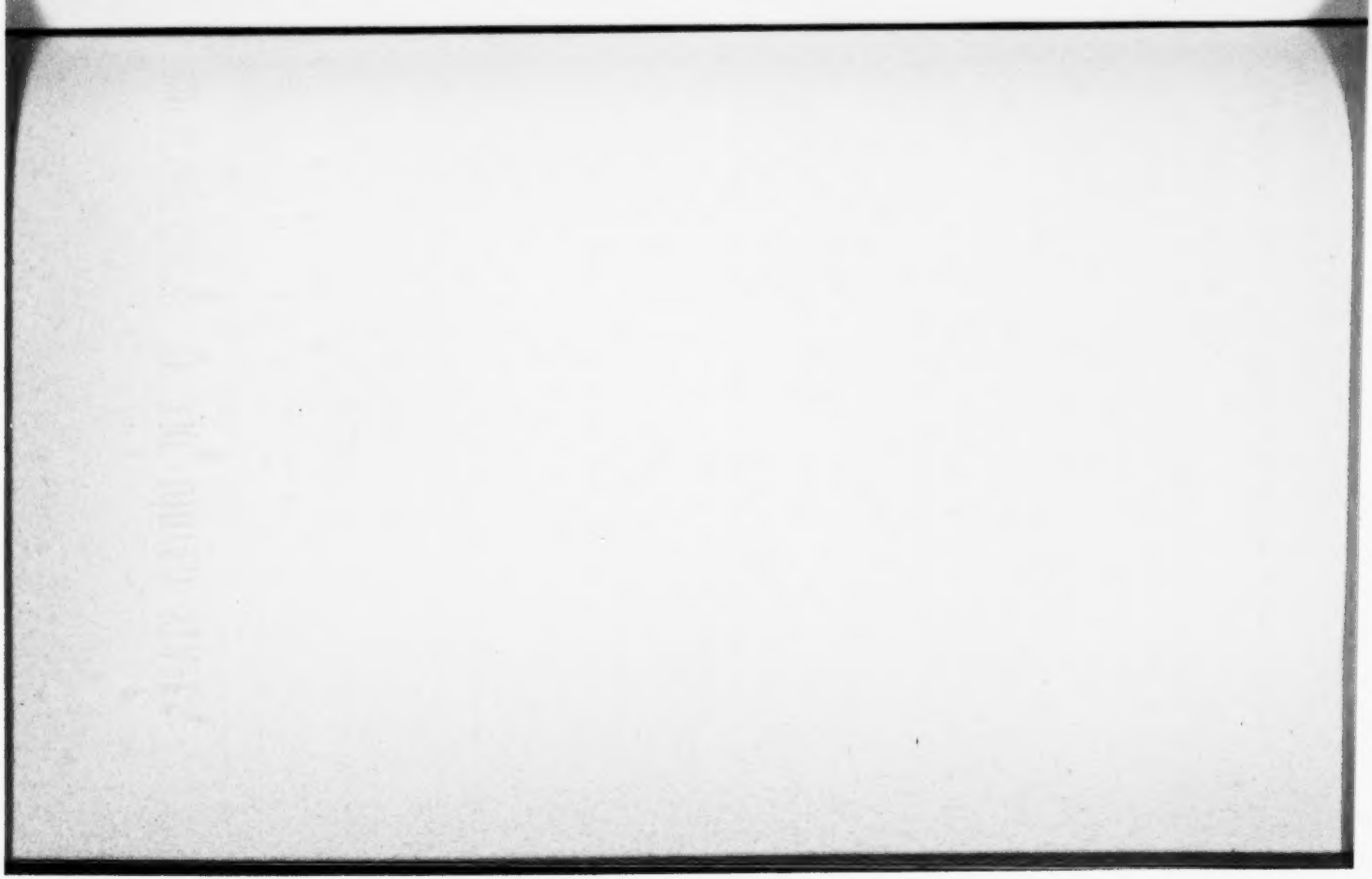
Respondent.

MOTION FOR REHEARING IN RE: JOHN LEN LACY APPLYING FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT:

FRANK J. LOONEY
Attorney for Petitioner

Of Counsel:

BEN F. ROBERTS
J. RALPH GOFF



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 310

JOHN LEN LACY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR REHEARING IN RE: JOHN LEN LACY APPLYING FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT:

Now comes petitioner in above numbered and entitled cause, and files this his motion for a rehearing, and a reversal of judgment denying his petition for certiorari, and alleges the following reasons:

1. The right to be indicted by a legal grand jury is one of the fundamental guarantees of the Constitution of the United States, when the charge is of an infamous crime.
2. A grand jury cannot function as a legal body when it is called and selected in a manner other than in strict compliance with the statutes enacted by Congress.

Petitioner shows that, whereas, Courts by virtue of their

existence must exercise certain power, and where there is no statute, United States District Court, as held in United States vs. Hill, F. C. 15 364, had the right to issue venire facias as under common law procedure, that the said Courts being of limited jurisdiction and powers are now permitted to have grand juries called only in compliance with the Acts of Congress, and particular United States Code, Title 28, Section 421.

Petitioner shows that said provision of the law, originally Judicial Code, Section 284 materially changed the pre-existing statute which read:

> "That no grand jury shall be summoned to attend any Circuit or District Courts unless one of the Judges of such Circuit Court, or the Judge of such district, in his own discretion, or upon a notification by the District Attorney that such jury will be needed, orders a venire to issue therefor, and either of said Courts may, in term time, order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever in its judgment it may be proper to do so." (United States Revised Statutes 810; Act 1846, 9 Statute at Large, 72, Section 3.)

In UNITED STATES VS. LACHER, 34 U. S. 624, 626, the Court said:

> "If there be any ambiguity in (specifying section) in-as-much as it is a section of the Revised Statutes, which are merely a compilation of the Statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law." (See Barnett vs. United States, 109 U. S. 218, 227).

Applying the doctrine announced in this decision, and comparing United States Revised Statutes 810 with the law, as it was originally written, and as it exists today, in Judicial Code, Section 284, we find:

> In the Judicial Code, after the word 'therefor' we have the insertion of the clause authorizing 'a second grand jury,' in the law as it now exists, an additional clause inserted providing for 'a third grand jury.'

The limited localities benefiting by these insertions being defined therein.

Confusion may have been caused by the continuance in the section of the following words:

> "And said Court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, wherever, in its judgment, it may be proper to do so."

Petitioner shows this does not authorize more than one grand jury at a time, a fact emphasized in the United States Attorney General's letter quoted in original brief attached to petition for certiorari, in the sentences:

> "During the Sixty-Ninth Congress this department recommended an amendment of Section 284, which would have authorized the summoning of additional grand juries without limit in populous districts, where the exigencies of the public service required such action. The Department did not, however, press that recommendation."

Petitioner shows the construction of Section 284 is contrary to the present contention of the Government.

This construction is buttressed by the language of

Justice Nelson in United States vs. Reed, F. C. 16134 2 Blatchford 435:

> "The Act of 1846 changed the law as it then existed, but the obvious extent of that change, as designed by Congress, and as appears from the face of the law, was to remove the necessity that previously existed of summoning a grand jury at every term of the Circuit and District Courts, with a view to diminish expenses.

Thus it is made clear that the language of the law was to "diminish" not only expenses, but grand juries and not to increase them, and [redacted] to add "additional grand juries" is nowhere suggested.

The same limitation on the language of Revised Statutes 810, which is therein quoted is made in United States vs. Breece, 172 Fed. 765, 768, where it is said:

> "The evident purpose of this Statute was to prevent the unnecessary attendance of a grand jury, and the expense and trouble of the same, at a term when there was no need for a grand jury, and no business to be brought before it. If a grand jury is deemed unnecessary before the Court meets, and afterwards it is found that a grand jury is needed, the Court may, by order in term time direct that they be summoned."

In 1807 Chief Justice Marshall in Ex Parte Bollman, 4 Cranch 75, on page 93, began his opinion with these words:

> "As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the Constitution, or by the laws of the United States******."
> "Courts which are created by written law, and whose

jurisdiction is defined by written law, cannot transcend that jurisdiction."

We respectfully request this Honorable Court to review the petition for certiorari, and the briefs filed herein, and to open for hearing this question which involves even more than the four freedoms, to-wit: That prized and primitive freedom from arrest and prosecution except in strict conformance with the requirements of the "written law."

WHEREFORE, petitioner prays that a rehearing be granted.

Respectfully submitted,

FRANK J. LOONEY,
Attorney for Petitioner.

Of Counsel:

Ben F. Roberts
J. Ralph Goff

I certify that this motion is made in good faith and not merely for the purpose of delay, this the 19th day of October, A. D. 1942.

FRANK J. LOONEY,
Attorney for Petitioner.